

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>BEVERLEE PROVAN</b>	:	<b>DETERMINATION</b>
	:	<b>AND ORDER</b>
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period of December 1, 1990 through May 31, 1994, and for Redetermination of Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Periods Ended January 15, 1991, March 31, 1992, and March 26, 1993.	:	DTA NO. 818373

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Petitioner, Beverlee Provan, 8 Bridge Terrace, Fort Montgomery, New York 10922, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1990 through May 31, 1994, and a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods ended January 15, 1991, March 31, 1992, and March 26, 1993.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) brought a motion dated July 3, 2001 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In response, petitioner, by her representative Ronald Jay Cohen, Esq., filed an affidavit in opposition and a cross motion for summary determination dated July 6, 2001. Petitioner also filed an affidavit of Beverlee Provan dated July 10, 2001, which was included as part of petitioner's motion papers and was received by the Division of Tax

Appeals on July 13, 2001. Accordingly, the 90-day period for the issuance of this determination and order commenced on July 13, 2001.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination and order.

***ISSUE***

Whether the Division of Taxation properly dismissed petitioner's request for a conciliation conference, filed in respect of certain notices of determination and deficiency, as untimely filed.

***FINDINGS OF FACT***

1. At issue in this matter is the timeliness of the protest by petitioner, Beverlee Provan, of seven notices of determination and three notices of deficiency. Petitioner filed a request for a conciliation conference in respect of the ten statutory notices at issue on January 18, 2001. Pursuant to conciliation orders dated February 9, 2001, the Bureau of Conciliation and Mediation Services ("BCMS") denied petitioner's request as untimely filed.

2. The notices of determination at issue assert sales tax due from petitioner as a responsible officer of Provan Ford Trucks, Inc., plus penalty and interest, as follows:

Notice Number	Date of Notice	Period	Sales Tax Assessed
L-005615851	05/04/92	12/01/90-02/28/91	\$38,432.52
L-008706820	04/22/94	03/01/91-05/31/91	\$ 7,969.76
L-008706822	04/22/94	09/01/92-11/30/92	\$10,798.15
L-008706821	04/22/94	12/01/92-02/28/93	\$ 2,150.21
L-008706816	04/22/94	09/01/93-11/30/93	\$14,168.30
L-010143609	03/20/95	12/01/93-02/28/94	\$ 1,409.00
L-010143608	03/20/95	03/01/94-05/31/94	\$ 1,952.00

3. Notice of determination numbers L-005615851 and L-008706816 are notices of estimated determination which result from an asserted failure by the corporation, Provan Ford Trucks, Inc., to file sales tax returns and pay tax for the periods covered by those notices. The other five notices of determination result from an asserted failure by the corporation to pay the sales tax as reported on the sales tax returns for those periods. The Division asserts liability against petitioner as a responsible officer of the corporation pursuant to Tax Law §§1131(1) and 1133.

4. The notices of deficiency at issue assert penalty pursuant to Tax Law § 685(g) as follows against petitioner as a responsible officer of Provan Ford, Inc.:

Notice Number	Date of Notice	Period Ended	Penalty Amount
L-010211714	04/06/95	01/15/91	\$15,590.00
L-010211715	04/06/95	03/31/92	\$ 3,625.54
L-010211713	04/06/95	03/26/93	\$ 2,392.91

5. The notices of deficiency assert penalty in the amount of withholding taxes reported but allegedly not paid by the corporation.

6. The Division did not submit copies of the Notice of Determination numbered L-005615851 and Notice of Deficiency numbered L-010211715 into the record herein.<sup>1</sup> The Division did submit microfiche copies of such notices. It is the Division's regular business practice to retain microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hard copies of statutory notices.

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<sup>1</sup> The Division did submit hard copies of the eight other statutory notices at issue.

7. Both microfiche and hard copies of statutory notices are created from assessment data which is entered into the Division's CARTS (Case and Resource Tracking System) computer system by Division employees. Such data is organized by the computer's "Create Assessment" program which, among other things, assigns assessment numbers to the data and sets up a CARTS case in the computer system for each such assessment number.

8. The CARTS System also has a pre-sort procedure program the purpose of which is to prepare statutory notices for mailing. As part of this program, bar codes are placed on the statutory notices and a certified mail control number is assigned to each notice. This number will correspond with the certified control number appearing on the certified mailing record (*see*, Finding of Fact "12") and with the certified mail documentation affixed to the envelope at the time of mailing.

9. Since both are created from the same data, the content of the microfiche copy of a statutory notice is, with minor exceptions, identical to that of the hard copy. The major difference between the microfiche and the hard copy is the format in which the data is arranged.

10. The facts set forth above in Findings of Fact "6" through "9" were established through affidavits of Carl Moeske, who is employed as a Supervisor of Data Processing in the Division's Information Systems Management Bureau. As part of his regular duties, Mr. Moeske oversees the daily computer operations of the Division's computer system, which stores information and generates printed documents, including statutory notices, which are sent to taxpayers.

11. All of the statutory notices at issue were addressed to petitioner, Beverlee Provan, as follows:

Provan-Beverlee  
306 Old Rte 304  
New City, NY 10956-5718

12. The Division's CARTS Control Unit's computer preparation of notices of determination and deficiency, such as those at issue herein, also includes the preparation of a certified mailing record ("CMR"). The CMR lists those taxpayers to whom notices of determination and deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the certified mailing record to the CARTS Control Unit.

13. Each computer-generated notice of determination and deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices.

14. After a notice of deficiency or determination is placed in the Division's Mail Processing Center ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to a branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his or her signature or initials to the CMR.

15. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

16. The Division generally does not request, demand, or retain return receipts from certified or registered mail.

***April 22, 1994 Notices of Determination***

17. With respect to the notices of determination dated April 22, 1994, the CMR relevant to such notices is a 38-page, fan-folded (connected) computer-generated document entitled "Certified Record for Zip + 4 Minimum Discount Mail." Page 1 of this document lists an initial date of April 12, 1994, which has been manually changed to April 22, 1994.

18. The April 22, 1994 CMR lists consecutive certified control numbers P 911 008 656 through P 911 009 072, inclusive. Each such certified control number is assigned to an item of mail listed on the 38 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

19. The April 22, 1994 CMR originally listed 417 items of mail corresponding to the 417 certified control numbers listed thereon. There were two deletions (made by hand) from the list. The deleted items appear on page 38 of the CMR. Such a "pull" of a piece of mail from a mailing may occur for any number of reasons. Any piece of mail so pulled will be segregated from the remaining group of statutory notices for correction and issuance at another time. Accordingly, following the two deletions, the CMR lists 415 pieces of mail corresponding to 415 certified control numbers.

20. Information regarding the subject notices of determination dated April 22, 1994 is contained on pages seven and eight of the CMR. Specifically, corresponding to certified control numbers P 911 008 732 and P 911 008 735 through P 911 008 737 are notice numbers L-008706816, L-008706820, L-008706821, and L-008706822, respectively, along with information listing petitioner's name and address as described in Finding of Fact "11" herein. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

21. Each page of the CMR bears the postmark of the Roessleville Branch of the U.S. Postal Service, Albany, New York, dated April 22, 1994. Each page also contains the signature of a Postal Service employee.

22. In addition to bearing a Postal Service postmark dated April 22, 1994 and the signature of a Postal Service employee, the last page of the CMR, page 38, indicates "total pieces" listed thereon of 417. As a result of the two deletions from the list (*see*, Finding of Fact "19"), this figure has been manually crossed out. Immediately below the total pieces listing is the heading "Total Pieces Received at Post Office." The number "415" has been handwritten next to this heading and below it is the signature of a Postal Service employee.

23. The affixation of the Postal Service postmark, the signature of the Postal Service employee on each page of the CMR, and the handwritten "415" next to the "total pieces received" heading on the last page of the CMR indicate that all 415 pieces listed on the CMR were received at the post office.

24. The facts set forth above in Findings of Fact "12" through "23" were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising

the processing of notices of determination and deficiency such as those at issue herein. Mr. Baisley is employed as the Chief Mail Processing Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

25. The fact that the Postal Service employee affixed a Postal Service postmark and signed his or her name to each page of the CMR and wrote "415" as the total number of pieces received at the Post Office indicate that 415 pieces of mail were received at the Post Office. This fact was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

***March 20, 1995 Notices of Determination***

26. With respect to the notices of determination dated March 20, 1995, the CMR relevant to such notices is a 20-page, fan-folded (connected) computer-generated document entitled "Certified Record for Non-Presort Mail." Page 1 of this document lists an initial date of March 9, 1995, which has been manually changed to March 20, 1995.

27. The March 20, 1995 CMR lists consecutive certified control numbers P 911 204 991 through P 911 205 201, inclusive. Each such certified control number is assigned to an item of mail listed on the 20 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

28. The March 20, 1995 CMR herein lists 211 items of mail corresponding to the 211 certified control numbers listed thereon. There are no deletions from the list.



29. Information regarding the subject notices of determination dated March 20, 1995 is contained on page seven of the CMR. Specifically, corresponding to certified control numbers P 911 205 059 and P 911 205 060 are notice numbers L-010143608 and L-010143609, respectively, along with information listing petitioner's name and address as described in Finding of Fact "11" herein. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

30. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, Albany, New York, dated March 20, 1995.

31. In addition to bearing a Postal Service postmark dated March 20, 1995, the last page of the CMR, page 20, indicates "total pieces" listed thereon of 211. This figure has been manually circled and below it is the signature or initials of a Postal Service employee.

32. Appearing immediately below the "total pieces" listing is the heading "Total Pieces Received at Post Office." No information appears after this heading.

33. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces listed" figure indicate that all 211 pieces listed on the CMR were received at the post office.

34. The facts set forth above in Findings of Fact "26" through "33" were established through affidavits of Geraldine Mahon and James Baisley.

35. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the

number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

***April 6, 1995 Notices of Deficiency***

36. With respect to the notices of deficiency dated April 6, 1995, the CMR relevant to such notices is a 57-page, fan-folded (connected) computer-generated document entitled “Certified Record for Zip + 4 Minimum Discount Mail.” Page 1 of this document lists an initial date of March 27, 1995, which has been manually changed to April 6, 1995.

37. The April 6, 1995 CMR lists consecutive certified control numbers P 911 002 553 through P 911 003 173, inclusive. Each such certified control number is assigned to an item of mail listed on the 57 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

38. The April 6, 1995 CMR herein lists 621 items of mail corresponding to the 621 certified control numbers listed thereon. There are no deletions from the list.

39. Information regarding the subject notices of deficiency dated April 6, 1995 is contained on pages 27 and 28 of the CMR. Specifically, corresponding to certified control numbers P 911 002 849, P 911 002 850 and P 911 002 851 are notice numbers L-010211713, L-010211714, and L-010211715, respectively, along with information listing petitioner’s name and address as described in Finding of Fact “11” herein. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

40. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, Albany, New York, dated April 6, 1995.

41. In addition to bearing a Postal Service postmark dated April 6, 1995, the last page of the CMR, page 57, indicates “total pieces” listed thereon of 621. This figure has been manually circled. Immediately below the total pieces listing is the heading “Total Pieces Received at Post Office.” The number “621” has been handwritten and circled next to this heading and below it is the signature or initials of a Postal Service employee.

42. The affixation of the Postal Service postmark, the signature of the Postal Service employee, and the handwritten and circled “621” next to the “total pieces received” heading indicate that all 621 pieces listed on the CMR were received at the post office.

43. The facts set forth above in Findings of Fact “36” through “42” were established through affidavits of Geraldine Mahon and James Baisley.

44. The fact that the Postal Service employee wrote and circled “621” next to “total pieces received” on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

***May 4, 1992 Notice of Estimated Determination***

45. The Division did not submit a CMR to document the mailing of the Notice of Estimated Determination numbered L-005615851 and dated May 4, 1992. The microfiche copy of this notice indicates that this notice was assigned certified control number P 911 204 356. The Division did submit a CARTS certified mail list, an internal document used by the Division to track, among other things, the number range of the certified control numbers for a particular

CMR, the “bill date” of a particular CMR, and the “rec’d P.O. validation” date for a particular CMR.

46. Insofar as may be relevant herein, the CARTS certified mail list submitted by the Division indicates that a CMR with certified control numbers ranging from P 911 204 265 to P 911 204 539 had a “bill date” of “5/4” and “rec’d P.O. validation” on “5/5/92.”

47. An affidavit of Ms. Mahon identified the CARTS certified mail list and its purpose. The Mahon affidavit also described the Division’s standard procedure for mailing statutory notices as of the date of the notice in question.

***Additional Facts***

48. The address to which all of the statutory notices at issue were addressed, 306 Old Rte 304, New City, NY 10956-5718, is the address given by petitioner in her New York State personal income tax return for the year 1991.

49. Petitioner did not file a personal income tax return for either of the years 1992 or 1993.

50. On May 4, 2001, the Division’s representative sent a Notice to Admit in this matter to petitioner’s representative, who received such notice on May 7, 2001. Among the matters contained in said notice, the Division requested that petitioner admit that she had received the statutory notices at issue within 30 days of their issuance. Prior to the filing of petitioner’s motion papers in response to the instant motion, the Division did not receive any response to its Notice to Admit. Petitioner filed a copy of a response to the Division’s Notice to Admit with her motion papers. Among the responses, petitioner denied having received the subject statutory notices within 30 days of their issuance.

***SUMMARY OF THE PARTIES' POSITIONS***

51. Petitioner asserts that she never received any of the ten statutory notices at issue in the instant proceeding. In her affidavit, petitioner Beverlee Provan alleges that she did not reside at the address listed on the notices from November 1991 during the entire period of time covered by the subject notices. Ms. Provan asserts that she lived at 3 Rosman Road, Thiels, New York during this period. Petitioner further asserts that the Division of Taxation knew that the address to which the subject statutory notices were sent was incorrect. As a consequence of her failure to receive the statutory notices, petitioner contends that the period of limitations on assessment has run and therefore moves for summary determination dismissing the notices at issue.

52. Preliminarily, the Division asserts that petitioner, by her failure to respond to the Division's Notice to Admit within 20 days after service thereof as required under section 3000.6(b)(2) of the Rules of Practice and Procedure, has admitted that she received the statutory notices at issue within 30 days of their issuance. The Division further asserts that it has shown proper mailing of the notices at issue on the dates claimed and that petitioner failed to timely protest such notices. Accordingly, the Division moves for summary determination dismissing the petition herein.

***CONCLUSIONS OF LAW***

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000, et seq.) provide that summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

B. Preliminarily, as noted above, the Division asserts that petitioner, by failing to respond to the Notice to Admit within 20 days, has admitted receipt of the subject statutory notices within 30 days of their issuance. Petitioner’s representative has disputed the claimed failure to timely respond and has submitted with petitioner’s motion papers a copy of a response to the Division’s Notice to Admit wherein petitioner denies each of the matters of which an admission was requested.

Section 3000.6(b)(3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal allows the administrative law judge to “allow a party to amend or withdraw any admission on such terms as may be just.” Under the present circumstances, even if the Division established that petitioner failed to timely respond to the Notice to Admit, it would clearly be unjust to

preclude petitioner from amending or withdrawing an admission where, as here, such admission, i.e., receipt of statutory notices, goes to the heart of petitioner's case (*cf.*, ***Burnside v. Foglia***, 208 AD2d 1085, 617 NYS2d 921). Accordingly, pursuant to section 3000.6(b)(3) of the Rules, I find that petitioner has not admitted receipt of the statutory notices within 30 days of their issuance as claimed by the Division.

***Issuance of Notices, Mailing Procedure and Date of Mailing***

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Tax Law § 681(a) authorizes the Division to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination or redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, *within 90 days of the proper mailing of the notice* (*see*, Tax Law §§ 689[b]; 170[3-a][a]; 1138[a][1]).

D. Absent a timely filed request for a conference or a petition neither BCMS nor the Division of Tax Appeals has jurisdiction to review a notice of determination or a notice of deficiency (*see*, ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see*, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden

of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Moeske, Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency and determination (*see*, Findings of Fact “10” and “24”).

H. With respect to the notices of determination dated April 22, 1994, the Division has presented sufficient documentary proof, i.e., the CMR, to establish that such notices were mailed as addressed on April 22, 1994. Specifically, this 38-page document lists sequentially numbered certified control numbers with corresponding names and addresses. Although two entries on this document (unrelated to the instant matter) have been deleted, the Division has satisfactorily explained and accounted for such deletions and has established that the subject notices were not deleted. All 38 pages of the CMR bear a U.S. Postal Service postmark dated April 22, 1994. Additionally, a postal employee wrote “415” next to the total pieces received heading and signed page 38 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes



documentary evidence of both the date and fact of mailing (*see, Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has therefore established that it mailed the subject notices of determination as claimed on April 22, 1994.

I. The relevant CMR also provides sufficient documentary proof to establish that the notices of determination dated March 20, 1995 were mailed as addressed on March 20, 1995. This 20-page document lists sequentially numbered certified control numbers with corresponding names and addresses. There are no deletions from this list. All 20 pages of this CMR bear a U.S. Postal Service postmark dated March 20, 1995. Additionally, a postal employee circled the entry “211” next to the “total pieces listed” heading and signed page 20 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon.<sup>2</sup> This evidence is sufficient to establish that the Division mailed the subject notices of determination as claimed on March 20, 1995.

J. Similarly, the relevant CMR also provides sufficient documentary proof to establish that the notices of deficiency dated April 6, 1995 were mailed as addressed, on April 6, 1995. Specifically, this 57-page document lists sequentially numbered certified control numbers with corresponding names and addresses. There are no deletions from the list. All 57 pages of the CMR bear a U.S. Postal Service postmark dated April 6, 1995. Additionally, a postal employee wrote and circled “621” next to the “total pieces received at Post Office” heading and signed page 57 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of

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<sup>2</sup>This fact was established through the affidavit of Mr. Baisley which specifically set forth the basis of Mr. Baisley’s knowledge for this proposition (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

both the date and fact of mailing (*see, Matter of Rakusin, supra*). Accordingly, the Division has established that it mailed the subject notices of deficiency as claimed on April 6, 1995.

***Address on Notices***

K. Tax Law § 681 directs the Division to mail a notice of deficiency to a taxpayer at his or her “last known address.” Tax Law § 691(b) defines a taxpayer’s “last known address” as the address given in the last tax return filed by him or her, unless subsequently thereto the taxpayer has notified the Division of a change in address.

L. The Division has established that the notices of deficiency at issue were mailed to petitioner at the address given on her 1991 New York personal income tax return and that petitioner did not file New York returns for 1992 or 1993. Further, although petitioner claimed in her motion papers that the Division knew the address on the notices to be incorrect, she offered no evidence in support of this general allegation. It is concluded therefore that the notices of deficiency were properly addressed to petitioner at her last known address pursuant to Tax Law §§ 681 and 691.

M. Where a notice of deficiency has been properly mailed, Tax Law § 681 does not require actual receipt by the taxpayer (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The statutory scheme thus places the risk of non-delivery upon the taxpayer and the 90-day period in which to file a protest is not tolled where a properly mailed notice is not delivered to the taxpayer. Accordingly, even if petitioner did not receive the notices of deficiency dated April 6, 1995 as she alleges, her request for a conciliation conference in respect of such notices

was nevertheless untimely. The petition in respect of such notices must, therefore, be dismissed.<sup>3</sup>

N. During the periods at issue, Tax Law §1138 provided that notice of a determination of tax due under Article 28 (sales tax) “*shall be given* to the person liable for the collection or payment of the tax” (emphasis added). Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” During the period at issue, then, the proper mailing of a notice of determination to a taxpayer at his or her last known address created a presumption of receipt which could be rebutted with proof that the notices were never received (*see, Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). Where the presumption of receipt is successfully rebutted, the 90-day period for requesting a conference with BCMS or a hearing under section 1138 is not triggered, and a petitioner is entitled to a conference or a hearing (*id.*; *see also, Matter of Karolight, Ltd.*, Tax Appeals Tribunal, February 8, 1990).<sup>4</sup>

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<sup>3</sup> It should be noted, however, that petitioner is not entirely without recourse here, for she may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If her request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

<sup>4</sup> Tax Law § 1138(a)(1) has since been amended and now provides for the mailing, rather than the giving, of notice to persons liable for collection or payment of the tax at that person’s last known address; in addition, such a notice becomes a fixed and final assessment unless a petition is filed within 90 days (L 1996, ch 267 §§ 1,3, applicable to tax years commencing on or after January 1, 1997). Thus, the presumption of receipt contained in Tax Law § 1147(a)(1) is now irrebuttable.

O. The Division mailed the notices of determination dated April 22, 1994 and March 20, 1995 to the address listed on the last New York personal income tax return filed by petitioner. There is no evidence in the record to suggest petitioner ever filed a return or made an application under Article 28, or gave the Division notice of a change in her address. Under such circumstances, the Division's use of the address listed on the last personal income tax return filed by petitioner was reasonable and met the requirements of Tax Law §1147 (i.e., "such address as may be obtainable"). The Division thus properly mailed the notices of determination dated April 22, 1994 and March 20, 1995 in accordance with Tax Law §§1138 and 1147, and thereby created a presumption of receipt by petitioner of those notices. As noted previously, such presumption may be rebutted with proof that the notices were never received (*Matter of Ruggerite, Inc. v. State Tax Comm'n, supra*). Here, petitioner has denied receipt of the statutory notices at issue. Specifically, petitioner's affidavit asserts that she did not reside at the address listed on the notice at the time of their issuance. Such evidence constitutes more than a mere denial of receipt (*see, T.J. Gulf, Inc. v. New York State Tax Comm'n*, 124 AD2d 314, 508 NYS2d 97) and establishes the existence of a material issue of fact, i.e., petitioner's receipt or nonreceipt of the notices. Accordingly, the Division's motion for summary determination with respect to the notices of determination dated April 22, 1994 and March 20, 1995 must be denied and petitioner's protest of these notices must be scheduled for a hearing in the Division of Tax Appeals which shall be restricted to the issue of timeliness (*see, Gerard v. Inglese, supra*).

P. With respect to the Notice of Estimated Determination dated May 4, 1992, the evidence submitted by the Division clearly fails to establish that the notice was delivered to the Postal Service (and thus mailed) on May 4, 1992 (*see, Matter of Rakusin, supra*). The

Division did establish through the affidavit of Ms. Mahon that it had a procedure for the mailing of notices at the time this notice was issued. The Tax Appeals Tribunal has held that where, as here, the Division has offered proof of its standard mailing procedure, but insufficient proof to show the date of mailing, “it is reasonable to infer that a notice has been mailed, albeit not on the date asserted by the Division, and that the proper remedy is not to cancel the assessment, but to view the petition as timely filed and to remand the matter for a hearing on the merits” (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). Accordingly, the petition in respect of the Notice of Estimated Determination dated May 4, 1992 is deemed timely filed and this matter will be scheduled for a hearing on the merits.<sup>5</sup>

Q. The Division’s motion for summary determination is granted with respect to the notices of deficiency at issue dated April 6, 1995 and the petition of Beverlee Provan is dismissed with respect to such notices.

R. The Division’s motion for summary determination is denied with respect to the notices of determination at issue dated April 22, 1994 and March 20, 1995 and petitioner’s protest of these notices shall be scheduled for a hearing in the Division of Tax Appeals on the issue of the timeliness of the conciliation request filed in respect of such notices.

S. The Division’s motion for summary determination is denied in respect of the Notice of Estimated Determination dated May 4, 1992 and petitioner’s protest of this notice is to be scheduled for a hearing on the merits once all other jurisdictional issues have been resolved.

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<sup>5</sup> It is noted that the Division asserts that the Notice of Estimated Determination dated May 4, 1992 resulted from a failure by the corporation to file a sales tax return for the period covered by this notice. Whether the statute of limitations bars this notice as petitioner claims may well turn on whether this assertion is found as a fact (*see*, Tax Law 1147[b]). If petitioner seeks to assert the statute of limitations as a bar to this assessment, such a defense should be raised at any subsequent proceeding in the Division of Tax Appeals.

T. Petitioner's cross-motion for summary determination is denied.

DATED: Troy, New York  
October 4, 2001

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE